IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 355 of 1996.

Judgement reserved on: 3.10.2007.

Date of decision: 8.11.2007

Jaishi Ram & anr. ….. Appellants.

Vs.

Kamal Dev & ors. …. Respondents.

Coram

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?[1]

For the Appellants : Mr. K.D.Sood, Advocate.

For the Respondents : Mr. Ankush Dass Sood, Advocate.

Kuldip Singh, Judge.

The appellants-plaintiffs are in appeal against judgement, decree dated 9.8.1996, passed by learned District Judge, Hamirpur in Civil Appeal No. 83 of 1990 confirming the judgement, decree dated 31.3.1990 passed by learned Sub Judge Ist Class, Hamirpur in Civil Suit No. 100/80.

2. The facts as emerge from the plaint are that appellants-plaintiffs filed a suit that appellants-plaintiffs and respondents-defendants are joint owners in possession of land comprised in khasra No. 951/687, measuring 1-17 Kanals as per jamabandi 1977-78,Tika Lambloo, Mauja Ugiyalta, Tehsil and District Hamirpur and respondents have no right to raise any construction over best portion of the suit land or to change its nature in any manner whatsoever till

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Whether the reporters of the local papers may be allowed to see the Judgment?

partition. In case, the respondents-defendants raise any construction, then a decree by way of demolition of construction be granted in favour of the appellants-plaintiffs.

3. Further facts are that suit land is situated in village Lambloo just on the road side ,the respondents- defendants have no right to build up or raise any construction on the suit land so as to change its user, because the land is joint and the appellants have not consented to the change of user. The respondents in the first week of August, 1980, started digging and collecting material for construction, hence the suit. The suit was filed against Dev Raj and Bihari Lal, who filed joint written statement and took preliminary objections of maintainability, valuation and court fee, cause of action, limitation, estoppel, necessary parties and jurisdiction of the court. On merits, it has been denied that appellants are owners in possession of the suit land. The land has been partitioned in family partition. The entries in the revenue record are not correct. The construction was raised in the year 1966 by laying the foundations and walls were constructed on the foundations in the year 1974. The nature of the suit land was changed before filing of the suit. The appellants never raised any objection when construction was raised by the respondents. It has been denied that digging work was started in the year 1980 or material was collected in that year by the respondents. The respondents prayed for dismissal of the suit. The appellants filed replication in which they denied the case set up by the respondents and reiterated their stand which was taken by them in the plaint.

4. The suit was dismissed on 14.6.1985 but in appeal learned District Judge on 1.6.1989 set aside the judgement and decree dated 14.6.1985 and remanded the case with the direction to the trial court to appoint revenue officer as local commissioner to demarcate the land and how much area is covered by the construction of Dev Raj and Bihari Lal. The trial court appointed local commissioner who submitted his report Ex. OW 1/D.

5. The learned Sub Judge after remand of the case under issue No. 6 has returned the finding that Dev Raj had constructed foundations of his shops in the year 1966 and then he constructed walls up to 3 ½ feet to 4 feet in the year 1974 much prior to the institution of the suit. The remaining construction was raised after the vacation of the stay order and therefore, the appellants are not entitled for the relief of permanent injunction or mandatory injunction. The trial court dismissed the suit on 21.3.1990. The appellants filed appeal against the decision dated 21.3.1990, which has been dismissed by the learned lower appellate court on 9.8.1996 and therefore, this second appeal has been filed by appellants against the judgement and decree, dated 9.8.1996.

6. The appeal has been admitted on the following substantial questions of law:-

(i) Whether in view of the fact that the property was joint of the parties, the defendants could raise construction on the best portion of the property and divert the same to its exclusive use without the consent of the plaintiff?

(ii) Whether in view of the report of the Local Commissioner and the fact that the construction had been made during the pendency of the case, the plaintiff was entitled to a decree for injunction and mandatory injunction?

(iii) Whether the findings of the court below are based on misconstruction of oral and documentary evidence and the court below has erred in law in denying the relief of injunction and injunction to the plaintiff particularly when the defendants had made construction on land, in excess of their share and that too on the best portion of the land abutting the road?

7. I have heard the learned counsel for the parties and gone through the record. The learned counsel for the appellants has submitted that parties are joint owners of the suit land, and therefore, the respondents could not raise construction on the best portion of the property and divert the same to its exclusive use without consent of the appellants. The respondents have raised the construction during pendency of the suit, therefore, appellants are entitled to mandatory injunction. The courts below have misconstrued the evidence on record and have erred in dismissing the suit of the appellants particularly when respondents have raised construction on land in excess of their share. The learned counsel for the respondents has supported the impugned judgement, decree.

Substantial questions of law No. 1 to 3:

8. The substantial questions of law No. 1 to 3 are inter-connected, therefore, these are being disposed of collectively. The

case of the appellants is that land comprised in khasra No. 951/687, measuring 1-17 Kanals is jointly owned by the parties and respondents are threatening to raise construction on best portion of the suit land, in case the respondents succeed in raising the construction during the pendency of the suit, then the appellants-plaintiffs prayed for demolition of such construction. The suit of the appellants is based upon cause of action of first week of April, 1980 when respondents started digging and collecting material for raising construction on the suit land. The respondents have submitted that the construction was raised on the suit land in the year 1966 by laying foundations and then in the year 1974 by raising walls. The courts below have held that foundations were laid by the respondents in the year 1966 then they raised walls in the year 1974 on the foundations and other construction was raised after the vacation of the stay by the court.

9. The learned counsel for the appellants has submitted that it has been proved on record that suit land is jointly owned by the parties and therefore, respondents have no right to use best portion of the suit land without the consent of the appellants. He has submitted that appellants are co-sharers in the suit land therefore, they are entitled to a decree of permanent prohibitory injunction and mandatory injunction against the respondents. In support of his submission, he has relied **Sant Ram Nagina Ram** vs. **Daya Ram Nagina Ram** [AIR 1961 Punjab 528].

10. PW 1 Jaishi Ram has stated that suit land is jointly owned by the parties. In the khata there is no other land on the road.

He has further stated that he had requested the respondents not to raise construction, but they did not pay any heed to his request. In cross-examination he has denied the suggestion that in the year 1966-67 respondents and Amar Nath laid the foundations but stated that they collected the stones. He has further stated that the foundations were there on the spot, but he is not aware who filled those foundations.

11. PW 2 Udho Ram was examined on 5.2.1981 and he has stated that Dev Raj started construction 2- 2½ months ago, earlier the land was vacant. He denied that foundations were laid by Dev Raj in the year 1966-67 and the walls were constructed in the year 1974-75. Jaishi Ram appeared in rebuttal also as PW 3 and has stated that Dev Raj has raised construction on the suit land two years after filing of the suit. In cross examination he has stated that he purchased the land 22 years ago but he never came in possession of the land.

12. PW 4 Jharu Ram was examined on 21.11.1984 and he has stated that Dev Raj raised the construction on the suit land 8-9 years ago. PW 5 Basant Ram was examined on 22.2.1985 and he has stated that respondents have constructed shops three years ago.

13. DW 1 Dev Raj has stated that he laid the foundations of his shops in the year 1966 and even Panchayat served a notice on him for raising construction without permission. In the year 1974, he raised walls on the foundations. DW 2 Miyan Singh has stated that plan Ex. DW 2/A was prepared by him. There are shops on the spot. Three –four shops are more than twenty years old and others were

constructed in between 1966- 1974. DW 3 Lohka Ram has sated that shops were 20-25 years old.

14. DW 4 P.S.Rana, Advocate as Local Commissioner has proved his report Ex. DW 4/A and the statements recorded by him Ex. DW 4/B to Ex. DW 4/K. DW 5 Rangila Ram has proved letter dated 6.1.1975 Ex. DW 5/A. DW 6 Nikku Ram has stated that disputed shops are in front of his shop. Dev Raj had laid foundations on the spot fifteen years ago. Thereafter three feet walls were raised. In the year 1974, when construction was raised and earlier also when foundations were dug nobody objected. DW 7 Ishwar Dass has stated that the shops are 10-11 years old and the shops which are now being raised, their construction was started in the year 1980. Dev Raj laid foundations in the year 1966 and in the year 1974, he raised walls thereon.

15. DW 8 Dhian Singh has stated that in the year 1974 Dev Raj had raised walls up to three feet of his shops and now this year the construction has been completed. DW 9 Man Chand has stated that there are 10-12 shops on the disputed land, 4-5 shops are 20-25 years old and remaining shops were constructed by Dev Raj in the year 1974. He constructed his own shop in the year 1966. Out of 10-12 shops, one shop is owned by him. The other shops are of Kamili Devi, Piar Chand, Amar Nath, Bihari Lal, Dev Raj, Jagdish Chand, Dhian Singh, Kirpa Ram and Narain Dass. When Dev Raj laid the foundations, the appellants did not raise any objection.

16. DW 10 Piar Chand has stated that there are ten shops on the disputed land. His own shop is there, which was constructed

in the year 1974. Dev Raj has also his shop and he laid its foundation 15-16 years ago. He started construction again in the year 1974 and the work was completed in the year 1981. In the year 1974, appellants did not raise any objection. Out of ten shops, three-four are new and rest are old. DW 11 Munshi Ram has stated that Dev Raj submitted form No. 9, dated 17.11.1966 for raising construction. DW 12 Kishan Chand has proved agreement dated 12.7.1974 Ex. DA. Bakshi Ram, Naib Tehsildar was examined as OW 1. He has proved his report Ex. OW 1/D, dated 10.10.1989.

17. The two courts below have recorded a finding that respondents raised construction on the suit land in the year 1966, then in the year 1974 and remaining after the vacation of the stay order by the trial court. In the evidence led by the parties it has come on record that respondents laid the foundations on the suit land in the year 1966 and at that time nobody objected. Thereafter further construction was raised on the foundations by respondents in the year 1974. The suit was filed on 16.4.1980 and thereafter the left over construction was completed on the disputed land. In **Sant Ram Nagina Ram's** (supra), which has been relied by the learned counsel for the appellants, it has been held that where a co-owner is in possession of separate parcels under an arrangement consented to by the other co-owners, it is not open to any one to disturb the arrangement without the consent of others except by filing a suit for partition. The respondents changed the nature of the suit land in the year 1966 when they laid foundations on the suit land, nobody objected at that time. The appellants accepted the construction

raised by the respondents by not questioning that construction. Thereafter the respondents again raised the construction in the year 1974 on the foundations already laid and at that time also nobody questioned the construction raised by respondents. As already noticed, the suit was filed on 16.4.1980, in other words for fourteen years the appellants accepted the change of user made by respondents on the suit land by raising construction thereon. Fourteen years of silence is more than sufficient to hold that appellants accepted the construction raised by the respondents on the suit land. Therefore, after fourteen years they cannot question the construction raised by the respondents on the suit land. The remedy, if any, available to the appellants is to partition the suit land.

18. It has come on record that other persons have also raised construction on suit land. DW 9 Man Chand, a co-sharer in the land in dispute has stated that there are 10-12 shops and one shop is owned by him. The other shops are of Kamili Devi, Piar Chand, Amar Nath, Bihari Lal, Dev Raj, Jagdish Chand, Dhian Singh, Kirpa Ram and Narain Dass. This statement of Man Chand that other persons have also their shops on the suit land has not been demolished in the cross examination. There is nothing on record that appellants have ever raised any grievance when other co-sharers raised construction on the suit land. In Ex. OW 1/D, the Local Commissioner has reported that on entire khasra No. 951/687, there are houses and shops and no part of this khasra number is lying vacant. This further goes against the appellants that they have accepted the construction raised by different parties on khasra No. 951/687. It is not the case of

appellants that on entire khasra No. 951/687 the respondents have raised construction. As per report Ex. OW 1/D the construction of Dev Raj is on 5 Marlas. The appellants have failed to prove and identify the construction raised by respondents after the filing of the suit. The two courts below have rightly appreciated the material on record. No case for interference has been made out. The substantial questions of law No. 1 to 3 are decided against the appellants- plaintiffs and in favour of the respondents- defendants.

19. No other point was urged.

20. The result of the above discussion, the appeal fails and is dismissed, no costs.

November 8, 2007. **(Kuldip Singh)**
(*Hem*) **Judge.**